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December 18, 2020

**By Email**

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**Re: New York City Bar Association Response to Request for Public Comment on a Proposed New Commercial Division Rule to Allow Virtual Evidentiary Hearings and Non-Jury Trials on Consent**

Dear Ms. Millett:

We write in response to your October 22, 2020, request for public comment regarding a proposed new Commercial Division rule to allow virtual evidentiary hearings and non-jury trials on consent (the “Proposal”).

The City Bar’s Council on Judicial Administration and State Courts of Superior Jurisdiction and Litigation Committees have considered the proposed new Commercial Division rule permitting remote video evidentiary hearings and non-jury trials on consent. As discussed below, we have concerns regarding several aspects of the proposed rule. Ultimately, rather than suggest changes to the Proposal, we recommend that the Proposal be held in abeyance for at least six months so that it can be considered in light of rapidly and robustly developing practical experience of the Commercial Division in this area.

There is general agreement that the Courts should, where appropriate, conduct evidentiary hearings and non-jury trials using remote video technology. The pandemic has accelerated the introduction of remote video proceedings in the state courts, and in many cases the benefits of employing remote video technology to conduct conferences, hearings, and bench trials—even after the pandemic no longer requires remote participation—are clear. Judges have deftly adopted

remote video proceedings. As a result, the status quo, even without the Proposal, is that remote video evidentiary hearings and bench trials already are being conducted.

Best practices regarding remote video proceedings are continuing to quickly develop, as courts and attorneys continue to adapt to improve efficiency, productivity, access, and fairness to the parties. Moreover, because courts already have exercised their discretion to conduct conferences, arguments, hearings and trials through remote video means, we see little harm in holding the Proposal in abeyance to allow continued evaluation of remote video proceedings. This deferral would permit the City Bar to address any issues that arise in the coming months, and to propose changes to the Proposal that would more thoroughly address potential drawbacks of remote video proceedings.

As an example of a point of discussion within the committees, there was considerable, but not universal, belief that the Proposal should be modified to remove the requirement that all parties consent to remote video proceedings. As written, the Proposal gives one party the right to veto the court's determination that remote video proceedings would more efficiently resolve a hearing or bench trial. The rule might be more effective if it instead provided that prior to conducting remote video proceedings, courts should permit parties to be heard (but not necessarily to engage in formal motion practice) regarding whether proceedings should be conducted in-person or by remote video. There are many reasons parties and judges may prefer in-person proceedings in particular cases, including to properly cross-examine and adequately weigh the credibility of witnesses. Further, under present circumstances, where many courts are simply unable to conduct in-person proceedings, the right of one party to refuse consent could interfere with the courts' administration of their docket. On the other hand, in certain cases remote proceedings may be inappropriate and prejudicial to one party if there is a significant disparity between the capabilities and resources of the parties or law firms. Courts have and will continue to evaluate the aptness of remote video proceedings in pending cases. If the Proposal is not immediately adopted, courts and litigants will have additional opportunities over the coming months to evaluate whether this unilateral ability to refuse consent should be replaced with alternate procedures.

Another example was over whether it should distinguish between evidentiary hearings and bench-trials, and whether different procedures should be adopted for each. For example, remote video proceedings may be suitable for certain types of evidentiary hearings but ill-suited for bench-trials involving numerous fact witnesses. Delaying adoption of the Proposal may provide additional guidance on these issues, as well as additional concerns that may arise over the coming months, that could be incorporated in a final comment to the Proposal.

Eileen D. Millett,, Esq.  
Office of Court Administration  
December 18, 2020

In sum, we believe the advantages and drawbacks of remote video proceedings continue to be evaluated by courts and lawyers. The pandemic has effectively provided a laboratory of necessity in which the evaluation continues and there are likely additional lessons to come out of this period. Deferring adoption of the Proposal would provide the legal community additional opportunities to take advantage of these lessons.

Respectfully,

Michael P. Regan, Chair  
Council on Judicial Administration

Bart J. Eagle, Chair  
State Courts of Superior Jurisdiction Committee

John M. Lundin, Chair  
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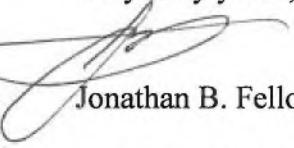
Re: Proposed New Commercial Division Rule to Allow Virtual  
Evidentiary Hearings and Non-Jury Hearings and Non-Jury Trials  
on Consent

Dear Ms. Millet:

Enclosed please find the Comments of the Commercial and Federal  
Litigation Section of the New York State Bar Association with respect to  
the proposed new Commercial Division Rule to allow virtual evidentiary  
hearings and non-jury hearings and non-jury trials on consent.

We appreciate the opportunity to comment on these proposed rules.

Very truly yours,

  
Jonathan B. Fellows, Chair

Cc: Catherine Carl, Sections and Meetings Liaison  
[ccarl@nysba.org](mailto:ccarl@nysba.org)

**TO:** New York State Unified Court System, Office of Court Administration

**FROM:** New York State Bar Association, Commercial and Federal Litigation Section

**DATE:** December 2, 2020

**RE:** Proposed New Commercial Division Rule to Allow Virtual Evidentiary Hearings and Non-Jury Trials on Consent

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The Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) is pleased to submit these comments in response to the Memorandum of Eileen D. Millett, counsel to the Chief Administrative Judge Lawrence K. Marks, dated October 22, 2020, seeking public comment on the proposed new Commercial Division Rule on virtual evidentiary hearings and non-jury trials on consent (the “Proposal”).

## I. EXECUTIVE SUMMARY

The Section recommends adoption of the Proposal with certain revisions as set forth in Point III below. The Section supports the Proposal, with the caveat that the proposed rule should provide that the court controls the videoconferencing technology. This will ensure that the court can monitor and control access to the virtual proceedings by witnesses and the public as may be warranted, while ensuring the presumption of public access to court proceedings. In addition, the Proposal should provide that *written* consent of the parties is required, which written consent may constitute a waiver of the right to a jury on an issue or cause of action. Finally, the Section recommends that the Proposal should expressly note that the use of virtual hearings is available under the Commercial Division Rule 9 and 9-a, *Accelerated Adjudication Actions*, and *Immediate Trial or Pre-Trial Evidentiary Hearing*, respectively. By doing so, the Section intends that Commercial Division Bar will consider use of these procedural mechanisms to promote the goal of efficiency in the resolution of Commercial Division actions.

## II. SUMMARY OF PROPOSAL

The Proposal is set forth in the June 2, 2020 Memorandum of the Commercial Division Advisory Council (attached as Exhibit A). Paragraphs 1 and 2 of the Proposal provide for the conduct of “an evidentiary hearing or a non-jury trial utilizing video technology” upon consent of the parties, including virtual participation by witnesses and the parties, as long as the following requirements set forth in Paragraph 3 are met:

- (3) The video technology used must enable:
  - i. a party and the party’s counsel to communicate confidentially;

- ii. documents, photos and other things that are delivered to the court;<sup>1</sup>
- iii. to be delivered to the remote participants;
- iv. interpretation for a person of limited English proficiency;
- v. a verbatim record of the trial; and
- vi. public access to remote proceedings.

### **III. RESPONSE AND SUGGESTIONS TO FURTHER THE PROPOSAL'S GOALS<sup>2</sup>**

The Section strongly endorses the Proposal with the following suggestions:

First, the Proposal should explicitly provide that the court will administer the videoconferencing technology to be used for virtual non-jury evidentiary hearings or non-jury trials. This will ensure that the court's staff can control access to the virtual proceedings as may be necessary for example to "seal" the virtual courtroom for presentation of confidential testimony and exhibits, or to ensure that certain witnesses are not permitted access during the testimony of other witnesses.

Second, the Proposal should provide that *written* consent of the parties is required in order to conduct a non-jury evidentiary hearing<sup>3</sup> or non-jury trial by remote means. The Proposal should also make clear that such written consent may constitute a waiver of the right to a trial by jury on an issue or cause of action. *Cf. C.P.L.R. 2218* (providing that, on trial of issues raised by motion, if an issue is triable to a jury, the failure of a party to demand a jury on an issue of fact "shall be deemed a waiver of the right to trial by jury"). This suggestion is intended to guard against ancillary disputes over implicit waivers of jury rights that may arise between parties that have consented to a non-jury evidentiary hearing or non-jury trial by virtual means.

Third, the Proposal should make reference to Commercial Division Rule 9, *Accelerated Adjudication Actions*, and Commercial Division Rule 9-a, *Immediate Trial or Pre-Trial Evidentiary Hearing*. Consistent with its April 30, 2018 Comments in support of Commercial Division Rule 9-a, the Section believes that explicit reference to these provisions may prompt their broader use by the Commercial Division Bar, which in turn will foster early resolution of material issues and may also encourage settlement of remaining issues in Commercial Division cases.

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<sup>1</sup> The Section assumes that the exchange, sharing and publication of exhibits to be used at the remote non-jury evidentiary hearing or non-jury trial under the Proposal will otherwise comport with Commercial Division Rule 28, *Pre-Marking of Exhibits*, and Commercial Division Rule 31(b), which governs the pre-trial exchange of exhibit books for use by the court, counsel and witnesses.

<sup>2</sup> The implications of the Proposal for motions to dismiss based on forum non conveniens pursuant to C.P.L.R. 327 is outside the scope of this Report. *See, e.g., Gowen v. Helly Nahmad Gallery, Inc.*, 60 Misc. 3d 963, 995-96, 77 N.Y.S.3d 605, 630 (Sup. Ct. N.Y. Co. 2018) (Bransten, J.) (denying motion to dismiss for forum non conveniens based on potential witnesses' unavailability because "in exceptional circumstances [the court] has the capacity to determine whether to permit video testimony at trial"), *aff'd*, 169 A.D.3d 580, 95 N.Y.S.3d 62 (1st Dep't 2019).

<sup>3</sup> The Section also recommends that the term "non-jury" should also modify the term "evidentiary hearing" to make clear that the Proposal applies only to *non-jury* evidentiary hearings.

**Commercial Division Committee**

Ralph Carter

**Federal Procedure Committee**

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# **EXHIBIT A**

## MEMORANDUM

**TO:** The Administrative Board of the Courts

**FROM:** Commercial Division Advisory Council

**DATE:** June 2, 2020

**RE:** **Proposal For New Commercial Division Rule Permitting Virtual Evidentiary Hearings and Non-Jury Trials on Consent**

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### Introduction

During the first few months of 2020, the New York State courts have made extraordinary progress in enabling virtual court operations. As we all know, these virtual court operations have been mandated by the current pandemic: they have resulted from necessity, not from choice. As a result of the pandemic, an in person trial has not been a viable option. The only possible option would be a trial which utilizes video technology. Moreover, even if the pandemic “passes,” there is no assurance that a future event could not render in person trials and hearings impossible or impractical. Nevertheless, these virtual operations have provided insights into opportunities and efficiencies which technology can provide for future court operations after the pandemic no longer requires remote participation in court proceedings.

As of mid-May 2020, virtual operations have been used in the New York courts primarily for court conferences. In June 2019, the Commercial Division Advisory Council proposed an amendment to Commercial Division Rule 1 to facilitate participation of counsel in court conferences and oral arguments of motions from remote locations through use of videoconferencing or other technologies. That proposal was generally well-received. In addition, the Appellate Divisions in New York have recently begun to hear oral arguments of appeals by counsel in remote locations using technology.

Based on the advances in technology and positive experiences of courts throughout New York State, this country and many parts of the world, the next logical step is virtual evidentiary hearings and non-jury trials, on consent. Accordingly, the Commercial Division Advisory Council now proposes a new Commercial Division Rule to permit virtual evidentiary hearings and non-jury trials, at the discretion of the judges and on consent of the parties, in the Commercial Division. In proposing this new Rule, the Advisory Council seeks to build on lessons learned in New York, other states, the federal court system, and other countries. The proposal is not intended as a temporary or interim measure to deal only with current constraints on court operations, attorneys, witnesses and parties caused by the pandemic. Instead, this proposal is designed to increase the efficiency and productivity of future court operations and also thereby benefit the public in general and the bar.

### **The Need for This New Rule**

Counsel, their clients, and witnesses in cases pending before the Commercial Division often are required to travel substantial distances to participate in court proceedings. Sometimes those distances are thousands of miles. Such travel is often inefficient, wasteful and expensive. Business clients are often sensitive to the cost issues presented by travel: they sometimes refuse to pay their lawyers for their travel time or at least object to and complain about the cost. Many business clients are also acutely aware that technology enables them to reduce travel time and expense in their own businesses, as evidenced by the rapid and substantial increase in the use of videoconferencing.

Evidentiary hearings and non-jury trials often require counsel, clients, and witnesses to engage in repeated expensive and time-consuming travel because unforeseen pressing other court matters may require the court to adjourn the proceeding for days or weeks on multiple occasions. Such adjournments and continuances are also often required by the unavailability of witnesses or

because of counsel's engagement in other matters. Each time other intervening litigation emergencies require that a proceeding be adjourned, clients may incur substantial additional time and travel charges.

Fortunately, as it has in other areas, technology provides an additional possible solution to these problems. Videoconferencing from remote locations will, in many cases, provide an efficient, cost-effective, and satisfactory alternative to many court proceedings. As discussed in this memorandum, the technology involved has been widely used in many different contexts for many years. The technology is remarkably inexpensive and many lawyers, witnesses and parties already use it for various purposes.

Accordingly, the Commercial Division Advisory Council now proposes a new Commercial Division Rule which will permit virtual evidentiary hearings and non-jury trials on consent. The proposed Rule does not require the court to permit any court proceedings to be conducted remotely and the court may exercise its discretion to decline to permit such participation. In addition, the proposed new Rule enables any litigant to decline to participate from remote locations.

This new Commercial Division Rule will not harm any constituencies or threaten the rights of any participant in court proceedings. What the new Rule will do is provide an optional process that could obviate huge amounts of wasted time and money devoted to unnecessary travel.

The Commercial Division Advisory Council believes that this new Rule will encourage parties to make voluntary use of an easy-to-use and helpful technological tool; will confer appropriate discretion on individual Justices to permit litigants to participate in court proceedings from remote locations where it would further the interests of justice, but not otherwise; and will

avoid any burden on the diminishing population of lawyers and others who lack the technical resources to participate in court proceedings from remote locations. An additional benefit of this new Rule will be to facilitate participation of lawyers, witnesses and parties whom have disabilities which prevent or hamper their attendance in court.

Implementing this proposal at this time will advance the goals of Chief Judge DiFiore's Excellence Initiative, which has already resulted in numerous "measures to improve promptness and productivity, eliminate case backlogs and delays, and provide better service to the public."<sup>1</sup> It will also be consistent with the Commercial Division's role as a laboratory for innovation in the court system; after new rules and procedures have been introduced in the Commercial Division, other parts of the court system can evaluate whether these innovations might be valuable to them as well. This proposal embraces the opportunities technology provides to help the public, the bar and the judiciary, by improving the efficiency and productivity of the New York State courts.

Finally, many of the law firms that regularly appear in the Commercial Division and their clients already use videoconferencing in their everyday business operations, making the Commercial Division the logical place to expand videoconferencing technology to the New York State courts. Thus, this amendment would help achieve the Excellence Initiative's "goal of administering a high-functioning court system that provides all litigants with just and timely dispositions and first-rate judicial service."<sup>2</sup>

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<sup>1</sup> STATE OF N.Y. UNIFIED COURT SYSTEM, THE STATE OF OUR JUDICIARY 2019, EXCELLENCE INITIATIVE: YEAR THREE i (Feb. 2019), [https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19\\_SOJ-Report.pdf](https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Report.pdf).

<sup>2</sup> *Id.*

## **Proposed New Commercial Division Rule**

The Commercial Division Advisory Council proposes promulgating the following new Commercial Division Rule:

- (1) If the requirements of paragraph (3) are met, the court may, with the consent of the parties, conduct an evidentiary hearing or a non-jury trial utilizing video technology.
- (2) If the requirements of paragraph (3) are met, the court may, with the consent of the parties, permit a witness or party to participate in an evidentiary hearing or a non-jury trial utilizing video technology.
- (3) The video technology used must enable:
  - (i) a party and the party's counsel to communicate confidentially;
  - (ii) documents, photos and other things that are delivered to the court to be delivered to the remote participants;
  - (iii) interpretation for a person of limited English proficiency;
  - (iv) a verbatim record of the trial; and
  - (v) public access to remote proceedings.

### **Overview of Videoconferencing Technology**

Video calling was introduced at the World's Fair in 1964 by AT&T. In 1992, McIntosh (Apple) released its personal videoconferencing software. At the present time, there are dozens of videoconferencing providers. Some of the most well-known products include FaceTime, WebEx, GoToMeeting, Zoom, and Skype (formerly Lync).<sup>3</sup> Videoconferencing is becoming ubiquitous in personal and professional life whether it is being used on a mobile phone, on a computer, or in a conference room. Even a standard business desktop phone can have built-in videoconferencing. For example, the Cisco 8865 desk phone provides videoconferencing capabilities.

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<sup>3</sup> For more information about videoconferencing providers, see, *Video Conferencing Software*, G2, <https://www.g2.com/categories/video-conferencing> (last visited May 18, 2020).

Information technology consulting firm Gartner publishes a series of market research reports entitled *Magic Quadrant* that rely on qualitative data analysis methods to demonstrate market trends and identify market participants. Gartner's *Magic Quadrant* lists Zoom, Cisco WebEx, and Microsoft Skype as the three leading videoconferencing options. As Gartner requires a login, we have cited Cisco's re-posting of the videoconferencing *Magic Quadrant*.<sup>4</sup> Confirming the ubiquity of videoconferencing, Cisco notes in its re-post that "Cisco WebEx hosts more than 6 billion meeting minutes every month."

#### **Use of Virtual and Remote Court Proceedings by Other Courts**

Videoconferencing technology has been used by courts throughout the United States, beginning in the 1990s.<sup>5</sup> While initially limited to certain types of proceedings, the use of such remote technology has naturally proliferated over the years. The current constraints on in-person proceedings as a result of the coronavirus pandemic have expedited the adoption of remote technologies in courts worldwide.

What may have been the first fully remote trial took place in London's Commercial Court over five days in early April of this year, having been moved online as a result of travel restrictions imposed due to the coronavirus.<sup>6</sup> Described by presiding Mr. Justice

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<sup>4</sup> Webex Team, *Cisco Named a Leader in Gartner Magic Quadrant for Meeting Solutions 2018*, WEBEX (Oct. 16, 2018), <https://blog.webex.com/2018/10/cisco-named-a-leader-in-gartner-magic-quadrant-for-meeting-solutions-2018/> (last visited May 18, 2020).

<sup>5</sup> See MIKE L. BRIDENBACK, NAT'L ASS'N FOR PRESIDING JUDGES AND COURT EXECUTIVE OFFICERS, STUDY OF STATE TRIAL COURTS USE OF REMOTE TECHNOLOGY 12 (Apr. 2016), <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>.

<sup>6</sup> Reed Smith LLP, *Attending a virtual trial before the London High Court: experience and practical tips*, LEXOLOGY (Apr. 6, 2020), <https://www.lexology.com/library/detail.aspx?g=13a88132-cf12-4e18-a8f3-b6d9a3aee712> (last accessed May 18, 2020).

Teare as a “most remarkable” achievement, participating lawyers state that it was a major success and predict that such remote trials are “here to stay” in a post-COVID world.<sup>7</sup>

Remote trials are also beginning to take place in the United States. An article in the *ABA Journal* on May 11, 2020 stated: “In April, a Florida court held a bench trial over Zoom to decide a child abduction case under the Hague Convention. Later that month, the same state held a major virtual trial on the voting rights of convicted felons, with the public listening in by phone.”<sup>8</sup>

An article in *Law 360* on May 11, 2020 stated: “On Wednesday [May 6, 2020], a virtual bench trial got underway in Virginia federal court. The case, in which Cisco Systems is accused of infringing a startup’s network recovery patents, started out with a technical tutorial, and the judge, attorneys and witnesses all participated remotely. Other virtual bench trials have been taking place across the country, although they have been fairly limited so far.”<sup>9</sup>

Although few trials have gone fully remote, the concept itself is not new. In 2001, Michigan authorized the development of a “cyber court” to hear business and commercial disputes over \$25,000, with a mandate that the court allow the use of audio, video, or Internet conferencing to resolve disputes.<sup>10</sup> Although budgetary constraints meant that the Michigan Supreme Court never funded the cyber court, its existence was permitted by Michigan law until

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<sup>7</sup> *Id.*

<sup>8</sup> Matt Reynolds, *Could Zoom jury trials become the norm during the coronavirus pandemic?*, ABA JOURNAL (May 11, 2020), <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic> (last visited May 18, 2020).

<sup>9</sup> Aebara Coe, *Remote Courtrooms Here To Stay As Judges Tackle Backlogs*, LAW360 (May 11, 2020), <https://www.law360.com/articles/1271812/remote-courtrooms-here-to-stay-as-judges-tackle-backlogs> (last visited May 18, 2020).

<sup>10</sup> Douglas L. Toering, *The New Michigan Business Court Legislation: Twelve Years in the Making*, AMERICAN BAR ASSOCIATION (January 31, 2013), [https://www.americanbar.org/groups/business\\_law/publications/blt/2013/01/03\\_toering/](https://www.americanbar.org/groups/business_law/publications/blt/2013/01/03_toering/) (last visited May 18, 2020).

2012, at which point the law was amended: however, the current statute maintains the state judiciary's commitment to implementing technology in business and commercial disputes.

Although occasionally mentioned as a concern, public access to remote trial proceedings is not an issue. It can be accomplished through livestreaming: a court establishes a YouTube channel or other streaming video service and posts public notice containing access instructions to the livestream. An article in the *ABA Journal* on May 11, 2020 states: “According to the National Center for State Courts, 16 states and the territory of Puerto Rico have ordered virtual hearings in response to the novel coronavirus . . . . In Texas, the public has access to hundreds of proceedings on YouTube, where prosecutors, judges, defendants and public defenders convene on Zoom. In Cook County, Illinois, the public can watch bond hearings online.”<sup>11</sup>

In 2010, the National Center for State Courts conducted a survey covering videoconferencing. When respondents were asked ten years ago to elaborate on whether videoconferencing helps or hinders the administration of justice, one respondent commented, “Video Conferencing can help tremendously with the administration of Justice, IF you have all the stakeholders wanting to make it work. Proactive judges and attorneys that find ways to use it and make it work, reap benefits for all.”<sup>12</sup> More recently, the National Center for State Courts has concluded: “Not only has videoconferencing proven to be effective within the courtroom,

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<sup>11</sup> Reynolds, *supra* note 9.

<sup>12</sup> See NATIONAL CENTER FOR STATE COURTS, NCSC VIDEO CONFERENCING SURVEY (Sept. 2010), <https://www.ncsc.org/services-and-experts/areas-of-expertise/technology/ncsc-video-conferencing-survey.aspx> (last visited May 18, 2020).

but it likewise benefits attorneys and judges by saving time and cutting costs of the *entire judicial process.*<sup>13</sup>

Videoconferencing can replicate the experience of talking to a real person across the table, including the nuances and body language. According to the 2010 Future Trends in State Courts Report, vendors have strengthened their understanding of the behavioral issues involved in effectively communicating with remote video technologies.<sup>14</sup> In fact, Judge Ronald Gould of the Ninth Circuit stated, “the technology has improved to the point where it is virtually the same as being in the courtroom, and I believe that there will be a trend to increasing use.”<sup>15</sup>

Videoconferencing is also growing in demand as a result of the globalization of legal practice where controversies often cross geographic barriers.<sup>16</sup> Attorneys from outside the local area of the court are requesting this technology to facilitate efficient participation by attorneys and reduce the demand for continuances due to travel constraints. Videoconferencing expands the boundaries of what can be achieved in the legal field.

State courts now routinely rely on remote technologies to take remote testimony, for oral arguments, and for court conferences. A 2016 study of state trial courts’ use of remote technology noted that “there are many trial courts that have experienced great success in integrating remote technologies to improve court performance without compromising established

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<sup>13</sup> *Video Technologies Resource Guide*, NATIONAL CENTER FOR STATE COURTS (Mar. 6, 2018), <https://www.ncsc.org/Topics/Technology/Video-Technologies/Resource-Guide.aspx> (emphasis added) (last visited May 18, 2020).

<sup>14</sup> THOMAS M. CLARKE, NATIONAL CENTER FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2010 – TECHNOLOGY REENGINEERING (2010).

<sup>15</sup> Daniel Devoe & Sarita Frattaroli, *Videoconferencing in the Courtroom: Benefits, Concerns, and How to Move Forward*, SOCIAL LAW LIBRARY BOSTON 28 (2009), <http://socialaw.com/docs/default-source/judge-william-g.-young/judging-in-the-american-legal-system/04devoe-sarita-paper.pdf?sfvrsn=6>.

<sup>16</sup> Pamela Maclean, *Courts Urged to Accept Videoconferencing*, LAW.COM (Apr. 22, 2005) (“The growing internationalization of prosecutions -- particularly international fraud -- raises problems for the government, which can't force foreign witnesses to come to the United States.”) (last visited May 18, 2020).

legal principles that have guided American courts for centuries.”<sup>17</sup> Indeed, courts in many states, including California, Florida, North Carolina, and New Jersey, rely on videoconferencing. For example, Rule 12.4 of the North Carolina Business Court General Rules of Practice and Procedure provides that in a pretrial attorney conference, “[t]he conference may be an in-person conference or conducted through *remote means*.<sup>18</sup>

Other jurisdictions have adopted similar court rules. Rule 99(a) of the Alaska Court Rules of Civil Procedure states regarding authorization for telephonic, video, or internet participation that the “court may allow one or more parties, counsel, witnesses or the judge to participate *telephonically* in any hearing or deposition for good cause and in the absence of substantial prejudice to opposing parties.”<sup>19</sup> Likewise, the Arizona Supreme Court provides that “when the appearance of a defendant or counsel is required in any court, subject to the provisions of this rule, the appearance may be made by the use of an *interactive audiovisual system*.<sup>20</sup> A Florida survey indicates that seven judicial circuits authorize attorneys to participate in select hearings through videoconferencing at the judge’s discretion. California and New Jersey courts also permit attorneys to appear remotely via video conferences by request in family law cases.<sup>21</sup>

The novel coronavirus outbreak has resulted in many states authorizing the use of remote technology in expanded proceedings. California’s Chief Justice issued a statewide order

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<sup>17</sup> See MIKE L. BRIDENBACK, NAT’L ASS’N FOR PRESIDING JUDGES AND COURT EXECUTIVE OFFICERS, STUDY OF STATE TRIAL COURTS USE OF REMOTE TECHNOLOGY 12 (Apr. 2016), <http://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf>.

<sup>18</sup> N.C. R. BUS. CT. § 12.4 (2019) (emphasis added).

<sup>19</sup> A.K. CT. R. § 99(a) (2019) (emphasis added).

<sup>20</sup> A.Z. SUPREME CT., § R-06-0016 (2019) (emphasis added).

<sup>21</sup> BRIDENBACK, *supra* note 6 at 20.

providing that “[c]ourts may conduct such a trial at an earlier date, upon a finding of good cause shown or through the use of remote technology, when appropriate.”<sup>22</sup> In Delaware, the Court of Chancery has issued a standing order requiring that “all hearings and trials shall be conducted only by telephonic or other electronic means.”<sup>23</sup> Connecticut, New Jersey, New Mexico, and Alaska each mandates virtual hearings for the pendency of the pandemic.<sup>24</sup> Even in states where the use of remote technologies has been more limited, the types of proceedings that may be conducted by videoconference have been expanded by judicial order in light of the pandemic. In Alabama, witnesses in court proceedings may be sworn in remotely for the first time.<sup>25</sup> In Louisiana and Nevada, the respective Supreme Courts have scheduled oral argument by videoconference.<sup>26</sup>

As acceptance of remote technologies spreads, the Commercial Division is well positioned to act as a leader in the area. The proposed Commercial Division Rule is a response

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<sup>22</sup> See Hon. Tani G. Cantil-Sakauye, Judicial Council of Cal., Statewide Order, 2 (March 23, 2020), <https://www.mendocino.courts.ca.gov/docs/Statewide-Order-by-the-Chief-Justice-Chair-of-the-Judicial-Council-3-23-2020.pdf>.

<sup>23</sup> See Court of Chancery, Standing Order No. 2 Concerning COVID-19 Precautionary Measures, 1 (March 16, 2020), <https://courts.delaware.gov/rules/pdf/Court-of-Chancery-Standing-Order-No2.pdf>.

<sup>24</sup> For an updated list of statewide orders issued in response to the pandemic, see National Center for State Courts Data Visualizations, *Coronavirus & The Courts*, (last updated May 5, 2020) at <https://public.tableau.com/profile/ncscviz#!/vizhome/StateCourtResponses to COVID-19/CovidTheCourts> (last accessed May 18, 2020).

<sup>25</sup> See Supreme Court of Ala., Administrative Order Approving Remote Administration of Oaths to Witnesses in Court Proceedings and Depositions, 2 (March 24, 2020), <https://www.alabar.org/assets/2020/03/March-24-2020-New-Order-Supreme-Court.pdf>.

<sup>26</sup> See Louisiana Supreme Court News, *La. Supreme Court to hear oral argument via video conference June 8-9*, KALB (Apr. 29, 2020), <https://www.kalb.com/content/news/La-Supreme-Court-to-hear-oral-argument-via-video-conference-June-8-9-570040391.html> (last visited May 18, 2020); The Supreme Court of Nevada, *In re Covid-19 Emergency Oral Arguments Procedure* (March 18, 2020), <http://caseinfo.nvsupremecourt.us/document/view.do?csNameID=58467&csIID=58467&deLinkID=766684&onBaseDocumentNumber=20-14952>.

to the practical realities, challenges and opportunities by taking another evolutionary step in a long history of use of remote technology in state courts. The Commercial Division Advisory Council has proposed a limited rule that grants the judge discretion to use, or not use, the technology, with the consent of the parties.

### **Use of Videoconferencing by Federal Courts**

A variety of federal courts are either in the midst of virtual trials or preparing to hold them. In Florida, for example, a constitutional challenge to a law affecting voting rights is being held over Zoom.<sup>27</sup> Chief Judge Colleen McMahon of the Southern District of New York intends to go forward with an international drug-patent case by use of remote technologies in light of the statewide stay-at-home order and bans on international travel.<sup>28</sup>

Videoconferencing technology is used in Federal Courts of Appeals, where attorneys (and judges) may conduct oral arguments from remote locations. As long ago as 2006, the Second, Third, Eighth, Ninth, and Tenth Circuits used some form of videoconferencing technology for conducting oral arguments.<sup>29</sup> Moreover, even that long ago, the Second Circuit used videoconferencing with remote appearances from attorneys for approximately 10% of the oral arguments conducted each week.<sup>30</sup> The Tenth Circuit includes specific instructions regarding videoconferencing oral arguments.<sup>31</sup> The Western District of Oklahoma has used

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<sup>27</sup> See Brad Bennett, *Florida voting rights trial to be argued online*, SPL CENTER (Apr. 25, 2020), <https://www.splcenter.org/news/2020/04/25/florida-voting-rights-trial-be-argued-online> (last visited May 18, 2020).

<sup>28</sup> Dorothy Atkins, *Judge Says Drug IP Bench Trial A Go 'Even During Pandemic,'* (Apr. 23, 2020), <https://www.law360.com/articles/1266965> (last visited May 18, 2020).

<sup>29</sup> MEGHAN DUNN & REBECCA NORWICK, FEDERAL JUDICIAL CENTER, REPORT OF A SURVEY OF VIDEOCONFERENCE IN THE COURTS OF APPEALS 3 (2006), <https://www.fjc.gov/sites/default/files/2012/VidConCA.pdf>.

<sup>30</sup> *Id.* at 5.

<sup>31</sup> See THE U.S. COURT OF APPEALS FOR THE TENTH CIR., VIDEOCONFERENCE ARGUMENTS GUIDE, <https://www.ca10.uscourts.gov/clerk/videoconferenced-arguments-guide> (last visited May 18, 2020); see

videoconferencing for status conferences, hearings, trials, oral arguments, and other proceedings with remote sites throughout the country, finding it to be a “cost-effective and productive technology.”<sup>32</sup>

In a Survey of Videoconferencing in the Courts of Appeals, for the judges interviewed, the benefits of videoconferencing outweighed its disadvantages.<sup>33</sup> As benefits, judges cited the following advantages of videoconferencing:

- saves travel time,
- allows for scheduling flexibility and reduces the administrative burden on the courts,
- decreases litigation cost, and
- increases access to courts for marginalized litigants whose in-person appearance might otherwise be prohibitively expensive.<sup>34</sup>

One judge remarked, “Not every lawyer wants to show in court, and it’s not a lack of commitment to the case but more an economic decision. Videoconferencing solves that.”<sup>35</sup> The disadvantages cited by the survey include technical difficulties, such as poor connections, and decreased level of personal interactions. However, the interviewed judges indicated no difference in their understanding of the legal issues in arguments that were videoconferenced versus those that were not.<sup>36</sup>

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<sup>32</sup> also THE U.S. COURT OF APPEALS FOR THE THIRD CIR., NOTICE: AVAILABILITY OF VIDEO-ARGUMENT (Dec. 2, 2013), <https://www.ca3.uscourts.gov/sites/ca3/files/videonot.pdf>.

<sup>33</sup> U.S. DISTRICT COURT, WESTERN DISTRICT OF OKLAHOMA, ATTORNEY’S MANUAL FOR COURTRoom TECHNOLOGY, <http://www.okwd.uscourts.gov/wp-content/uploads/2015/01/Courtroom-Technology-Manual-0411.pdf> (last visited May 18, 2020).

<sup>34</sup> DUNN & NORWICK, *supra* note 7 at 16.

<sup>35</sup> *Id.* at 8-9.

<sup>36</sup> *Id.* at 9.

<sup>36</sup> *Id.* at 12.

Many federal courts have installed videoconferencing equipment, which can be used for remote witness testimony and other court proceedings.<sup>37</sup> In fact, the United States Judicial Conference Committee on Automation and Technology has endorsed the use of videoconferencing systems as “necessary and integral parts of courtrooms.”<sup>38</sup>

Federal courts have often permitted testimony of witnesses through remote transmission. The practice of securing the testimony of a witness through remote transmission is generally accomplished through the use of a live video feed that transmits an image of the witness, along with corresponding audio, onto a video monitor situated in a courtroom. However, the language of Federal Rule of Civil Procedure 43(a) does not mandate that video be the form of transmission and the Rule has been cited in connection with requests for telephonic transmissions as well.

As one appellate judge remarked, “Videoconferencing is the wave of the future.”<sup>39</sup>

### **Use of Videoconferencing in New York**

The Chief Judge of the State of New York has stated that “The New York State courts are open and welcoming to foreign litigants.”<sup>40</sup> We believe that business litigants from Argentina or India or Australia are more likely to accept this invitation to litigate in New York

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<sup>37</sup> See, e.g., UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, COURTROOM TECHNOLOGY, <http://www.nmd.uscourts.gov/courtroom-technology> (last visited May 18, 2020).

<sup>38</sup> LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE COURTROOM TECHNOLOGY MANUAL (Aug. 1999), <https://www.uscourts.gov/sites/default/files/courtroomtechnologymanual.pdf>.

<sup>39</sup> DUNN & NORWICK, *supra* note 7 at 17.

<sup>40</sup> Janet DiFiore, *New York State of Mind*, I ASIA BUS. L. J. 33, 37 (May-June, 2017), <https://www.vantageasia.com/ny-state-of-mind/>.

State courts if they are able to observe and participate in court proceedings in their case through videoconferencing without substantial expense.

In the New York County Commercial Division, Justice Scarpulla's courtroom has recently implemented videoconferencing technology, and she has started using Skype for remote testimony, oral argument, and court conferences. In addition, Kings County Surrogate Margarita Lopez Torres has explained that her court has utilized videoconferencing or Skype to avoid the very expensive use of "commissions" for hearings in other countries. Further, the Appellate Division for the Second Judicial Department has installed Skype equipped large screen computers in both its courtroom and consult room and has started to use Skype for arguments of appeals and motions.

The proposed new Commercial Division Rule is similarly permissive to that adopted by the state courts listed above. The Commercial Division Advisory Council has proposed a limited rule that grants the judge discretion to use, or not use, the technology.

### **Cost Considerations**

The Commercial Division Advisory Council has addressed the cost of videoconferencing in this memorandum to demonstrate how remarkably inexpensive this technology is in comparison to the savings which its use can provide. In general, the Advisory Council seeks to identify technological innovations which provide substantial savings and efficiencies yet are inexpensive for the court and counsel to obtain and use. The Advisory Council cannot think of any other technology (with the possible exception of hyperlinking) which offers such significant economic benefits to court constituencies at such minimal expense.

To be more specific, a lawyer who travels from San Francisco to New York County to participate in an evidentiary hearing or trial will require a minimum of 15 hours of travel time for each trip to New York during the proceeding and will incur out-of-pocket

disbursements for airline tickets, ground transportation, lodging, and meals. If that lawyer bills \$1,000 per hour, the cost of the travel to the lawyer's client for each trip to New York would be \$15,000 in attorney's fees plus at least another \$1,000 in disbursements. A lawyer who travels from White Plains to Albany County to participate in an evidentiary hearing will require a minimum of four hours of travel time and will incur out-of-pocket disbursements for travel by train or automobile. If that lawyer bills \$600 per hour, the cost of the travel to the lawyer's client for each trip to Albany County during the proceeding would be \$2,400 in attorney's fees plus another \$100 in disbursements.

In addition to the minimum costs outlined above, a lawyer who is required to travel to participate in court proceedings is likely to incur other expenses as well. Prudent lawyers do not wait to arrive in the courtroom until the precise minute that their court proceeding is scheduled to begin; instead, prudent lawyers schedule their travel so they will arrive on time no matter what travel difficulties they may encounter. Thus, the number of hours estimated for travel time in the preceding paragraph should generally be increased to provide a "cushion" against travel problems. In addition, lawyers may wish to ask a partner or associate who has participated in the matter to travel with them; such travel can easily double the cost estimates set forth above.

The distance problem is often compounded by significant traffic congestion, not only in the center of urban areas, but on the major traffic arteries that lead to and from urban areas. These traffic issues are part of the reason for the growth of mobile applications such as Waze and Google Traffic and increased consideration of congestion pricing programs. Moreover, travel is often impeded by adverse weather conditions.

When the lawyer arrives in the courtroom, there is, of course, no guarantee that the court will be able to hear the matter at the time originally scheduled. Although the Commercial Division has made substantial efforts to schedule particular proceedings for specific times and to adhere to its schedules, inevitably there will be occasions where other urgent court business will require that counsel must wait to be heard. The cost of any such waiting time must be added to the estimates of minimum costs for travel time outlined above.

In contrast, the cost of videoconferencing is minimal. In addition, the use of videoconferencing permits the lawyer's partners and associates who have participated in the matter (or who are merely interested) as well as the lawyer's client to observe the proceeding in real time and to provide assistance to the lawyer who is making the appearance. If the pendency of other court business prevents the Commercial Division judge from presiding over the court proceeding at the scheduled time, counsel may conduct other business while waiting for electronic notification from the court clerk that the judge is able to proceed.

Use of videoconferencing technology may also provide greater flexibility for the court in scheduling and adjourning evidentiary hearings and non-jury trials. Because so much less time is required for counsel to participate in a court proceeding, the court may be able to schedule a proceeding for a time period that would not be sufficient if counsel had to travel hours in order to participate. In addition, the court may be able to adjourn a proceeding even at the last minute before it is scheduled to commence with little inconvenience to counsel because they do not need to leave their offices to participate.

The cost of trials can be substantially reduced by use of remote technology. Because of the requirements of other court business, judges are often unable to conduct non-jury trials from day to day until completed. Instead, many judges will schedule testimony for a

morning or afternoon or a full day, with a hiatus until more time is available for additional testimony. Videoconferencing technology allows the court much greater flexibility under these circumstances, and saves lawyers and their clients substantial sums as well as alleviating “wear and tear” that travel inevitably causes.

In providing a cost analysis in this memorandum, the Advisory Council has used Skype as an example to enable discussion of specific dollar figures. However, the Advisory Council expresses no preference for Skype or any other particular type of videoconferencing technology. While Skype is only being used as an example, it should be noted that Microsoft has published an End of Life (EOL) date as of July 31, 2021 for Skype On-line.<sup>41</sup> Microsoft is replacing Skype with Teams. Teams was originally made available to select customers by Microsoft in 2017. Today it is available to everyone. Per Microsoft’s “Welcome To Microsoft Teams” website, Teams is a part of O365 and is a “*. . . a complete meeting and calling solution.*”<sup>42</sup> If the courts decide O365 is the preferred videoconferencing platform, there may be benefit in starting with Teams so that a change will not be necessary in approximately 14 months as Skype reaches EOL. The use of Teams, instead of Skype, may have different pricing under the O365 academic licensing program.

The New York courts are currently using Skype and that will presumably be the default technology for lawyers to use. If a lawyer wishes to use another type of videoconferencing technology, then it should be up to the lawyer who wants to appear by video to provide appropriate access to the other technology and, if necessary, suitable equipment. The

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<sup>41</sup> *End of life program for the integration of Skype for Business with third-party audio party audio conferencing providers*, MICROSOFT (May 7, 2020), <https://docs.microsoft.com/en-us/skypeforbusiness/legal-and-regulatory/end-of-integration-with-3rd-party-providers> (last visited May 18, 2020).

<sup>42</sup> *Welcome to Microsoft Teams*, MICROSOFT (May 1, 2020), <https://docs.microsoft.com/en-us/microsoftteams/teams-overview> (last visited May 18, 2020).

Advisory Committee believes that it is not necessary or appropriate for its proposed new Commercial Division Rule to address specific types or brands of videoconferencing technology because technology changes so rapidly that a rule incorporating specific types of technology may become obsolete within a few months. In addition, the Advisory Council's proposed new Commercial Division Rule recognizes the court's authority to control the technology by providing that the court "may" conduct an evidentiary hearing or a non-jury trial remotely or "may" permit a witness to participate in an evidentiary hearing or a non-jury trial remotely; thus, the court can withhold permission to use videoconferencing unless suitable technology is available or provided.

Skype is a part of Microsoft's Office 365 (O365) offering. O365 is a collection of on-line (hosted) products and services. Microsoft offers multiple personal and business plans for O365. The higher the plan cost, the more products and/or services that are included.

For illustrative purposes, we have set forth below a simple comparison of two Enterprise plans including the applications and the services included in each plan and the cost:

**Office 365 Enterprise E1:**

- Applications: Not included
- Services: Includes Skype for Business and the ability to "Host unlimited HD videoconferencing meetings"
- Cost: \$8 per user per month, with an annual contract

**Office 365 Enterprise E3:**

- Applications: Outlook, Word, Excel, etc.
- Services: Includes Skype for Business and the ability to "Host unlimited HD videoconferencing meetings"
- Cost: \$20 per user per month, with an annual contract

Consumer pricing is illustrated above. Microsoft provides special pricing for governmental organizations.<sup>43</sup> Microsoft does not display the cost or discounts associated with governmental plans.

Generally the only other cost is a camera as long as the person joining a videoconference already has a computer and Internet connectivity. Logitech is a commonly known brand of USB (plugs into a computer) camera. Depending upon the resolution and features, pricing ranges from \$40 to \$200. Features can include the camera following persons if they move, a built-in microphone, wide-angle lens, light adjusting, and so forth.<sup>44</sup> Relatedly, iPads, tablets, and laptops commonly have cameras built-in.

### **Security and Control Considerations**

As with all forms of technology, there are security and control considerations. Due to the work from home requirements around COVID-19, the use of videoconferencing increased dramatically overnight. At the same time, so have inappropriate uses of it. In an article entitled “FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic,” the following example is noted. “March 2020, a Massachusetts-based high school reported that while a teacher was conducting an online class using the teleconferencing software Zoom, an unidentified individual(s) dialed into the classroom. This individual yelled a profanity . . .”<sup>45</sup>

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<sup>43</sup> *Office 365 Government Plans*, MICROSOFT (May 5, 2020), <https://docs.microsoft.com/en-us/office365/servicedescriptions/office-365-platform-service-description/office-365-us-government/office-365-us-government> (last visited May 18, 2020).

<sup>44</sup> *WEBCAMS for Video Conferencing and Video Calling*, LOGITECH, <https://www.logitech.com/en-us/video/webcams> (last visited May 18, 2020).

<sup>45</sup> *FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic*, FBI (Mar. 30, 2020) [https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic/layout\\_view](https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic/layout_view) (last visited May 18, 2020).

While videoconferencing providers have and are making changes to help prevent misuse, many firms are instituting policies requiring the use of passwords for participants to join meetings. Some videoconferencing software companies provide protocols that only allow people to join the meeting if admitted at the time of the meeting. That is, when a participant connects to a meeting, they wait in a virtual lobby until the Host admits them.

Several courts have already enhanced public access to court proceedings by arranging for live-streaming and video recording of court proceedings. We encourage the expansion of such public access.

If and when court proceedings allow the public to attend, it will be vital to have controls in place to prevent interruptions. As people would not be required to travel to the court to watch proceedings, more people may attend. Also, as people will be connected anonymously, it is a possibility an individual may take some disruptive action that they would not do in person where they would be seen. To this end, it will be important to have the ability to mute all public participants. This should include the ability for people to verbally interject, start a chat / IM in the conferencing software, or in any other way interact with the videoconference other than to watch and listen.

### **Procedural Requirements**

Different facets of court proceedings may require some adjustments, but should still be viable through videoconferencing. Evidentiary hearings are an example of this. Continuing with the example of using Skype / O365, there is an option in Skype to allow participants to share their computer desktop and thereby show a document, PowerPoint presentation, picture, or other evidence. Additionally, for evidence storage, control, and tracking, Microsoft offers a few products that can be bundled in with O365. Microsoft's OneDrive On-line is a very simplistic file storage application that offers some control over who

can access files.<sup>46</sup> SharePoint On-line allows for more granular controls and document storage structures. Depending upon how it is used, some setup may be required.<sup>47</sup> Other functions of the court, such as having Court Reporters attend, can be accomplished as well. A stenographer may participate in a videoconference the same as Judges and counsel.

There appears to be at least a growing belief that through the use of videoconferencing and other technologies, all court proceedings will be viable remotely. The National Center for State Courts (NCSC) has provided a state by state listing of rulings that direct, in-part, how courts should operate during the COVID-19 pandemic. In a document published by the NCSC, Louisiana notes “All essential court functions should be conducted with the use of video and telephone conferencing whenever possible.” Under New Mexico, the document notes that “Judges must conduct audio and video teleconferencing for civil and criminal proceedings.”<sup>48</sup>

### **Preparation**

All software, no matter how simple, requires some time to install and/or become accustomed to. Additionally, as some people use Windows PCs, others use Macs, and others may be using a Chromebook or tablet, there are nuances between each of the operating systems that can vary the way software needs to be interacted with. This is true even when working with software that is web based. To this end, it may be prudent to provide potential participants with

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<sup>46</sup> *OneDrive*, MICROSOFT, <https://www.microsoft.com/en-us/microsoft-365/onedrive/online-cloud-storage> (last visited May 18, 2020).

<sup>47</sup> *Compare SharePoint Online options*, MICROSOFT, <https://www.microsoft.com/en-us/microsoft-365/sharepoint/compare-sharepoint-plans> (last visited May 18, 2020).

<sup>48</sup> *Coronavirus and the Courts*, NATIONAL CENTER FOR STATE COURTS (March 24, 2020), <https://www.ncsc.org/~media/Files/PDF/Newsroom/Coronavirus-News-Updates-Roundups/Coronavirus%20and%20the%20Courts%20State%20Profiles%203-24-2020%2012pm.ashx> (last visited May 18, 2020).

basic instructions, a frequently asked questions list, and a way for them to test videoconferencing with the courts' IT department.

### **Conclusion**

Videoconferencing is a great option familiar to all or almost all Commercial Division constituencies. It enables lawyers and their clients to save time and money. The case for making greater use of this cost effective technology in evidentiary hearings and non-jury trials is obvious and compelling, and it presents an opportunity for the Commercial Division to continue its innovation and leadership in the smart adoption of technology in aid of the efficient administration of justice. The proposed new Commercial Division Rule is in line with the approach of other state and federal courts, confers discretion on individual Justices to permit participation in court proceedings from remote locations in the way that makes sense for their particular docket, and is calculated to avoid any burden or prejudice to the few lawyers who might not want to use this technology. The Commercial Division Advisory Council recommends building on the experience of other courts by adopting the proposed new Rule.

**From:** [GOLDBERG](#)  
**Sent:** Thursday, December 10, 2020 11:28 AM  
**To:** [rulecomments](#)  
**Subject:** Remote video testimony Proposed Commercial Division  
Rules  
**Attachments:** remote video testimony.pdf

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I offer the attached comments as to issues involving remote video testimony either at a trial or in a deposition. The Administrative Board of the Courts is seeking public comment on the issues raised by remote testimony.

Eugene H. Goldberg, attorney, associate at Gallet Dreyer & Berkey LLP.

Please be CAREFUL when clicking links or opening attachments from external senders.

**REMOTE VIDEO TESTIMONY DURING DEPOSITION AND TRIAL**  
**-SAFEGUARDS AS TO INTEGRITY OF THE PROCESS-**

The COVID 19 pandemic has encouraged testimony by witnesses distant from questioning attorneys and triers of facts. Remote video testimony allows for observation of the witness's demeanor. Remote video testimony also creates technical issues associated with exhibits, software and machinery. But there are other issues as to integrity which are unique to remote video testimony.

Federal Rule of Civil Procedure 43(a) is a good starting point when discussing the integrity of the process. The rule permits a federal court to take testimony remotely "for good cause in compelling circumstances and with appropriate safeguards."

The Advisory Committee which recommended this language envisioned safeguards must be in place to ensure

1. Accurate identification of the witness and administering of the oath;
2. Protection of witness from influence from persons present with the witness; and
3. Accurate transmission.

I consider the third item as technical and will not discuss it.

How and who confirms the identity of the witness, and when should that be done? If the parties and/or their counsel know the witness, that issue is lessened. But if an overseas business custodian is testifying to more than the contents of business records, more may be required to confirm identity. Depending upon the circumstances, the witness should be asked to prove his identity several days in advance to permit confirmation.

The next issue concerns the oath. An oath establishes the witness's recognition of the need to tell the truth. This is weakened if distance creates immunity from contempt or perjury prosecution. In state court proceedings, contempt or perjury prosecution depends upon a sister state's comity. Virginia rules for remote testimony recognize that an out-of-state witness should consent in advance in writing to Virginia's jurisdiction and laws for contempt and perjury. This leads to a cross-examination tactic for an out-of-state witness. Ask if the out-of-state witness is aware that he is subject to prosecution for contempt or perjury only in the state where he is testifying. Ask if he will sign a consent. If the witness declines, this can be used for impeachment. This tactic is less available if the proceeding is in federal court.

The second issue concerns the witness's conduct during the remote testimony. During the video testimony, the witness should always be in view of the camera. But the witness, even though in view, may be referring to extraneous off camera material. The witness should be instructed at the beginning of his testimony that he is not to refer to extraneous material except for exhibits presented to him. At the end of his testimony, he should be asked if extraneous material was referred to, in which case it must be identified.

If the remote testimony is conducted in a clean room, without material there, this danger is reduced. If the computer the witness uses is provided by the reporter or a third party vendor, it is less likely that the witness is accessing other electronic files to aid his testimony. If the witness uses his own

computer to testify, there is a possibility that he may access files on his own computer to aid his testimony.

If the witness is testifying from his own dwelling, there is a greater potential that there are materials there or computer files which the witness will access during the testimony. Randy Heller has written an order in an arbitration for remote testimony in which the remote witness was directed not to have any hard copies of documents in front of him or her, except with the consent of the arbitration panel. For similar reasons, Adam Felsenstein had Adam Berkey physically present with a remote witness in a New York court proceeding. Or if the reporter is present with the witness, the reporter can be instructed to make notes on whether any extraneous material was used by the witness or other persons came into the room. The reporter will be instructed that at the end of the testimony that he will be asked to detail if this occurred.

During the pandemic, it may not be possible to have someone else physically present to ensure that other material is not being used by the witness. Periodically, a questioner may ask the witness to pan the camera around the room to see if there is other material in the room. Alternatively, a camera may be positioned on a tripod behind the witness to show what the witness is looking at during testimony.

There is the possibility that the witness is being coached by someone physically present with the witness. Randy's arbitration order presumed that the witness started his testimony alone and directed that if someone else joined the witness after the session began, the new person should be identified at the earliest opportunity. But a witness may be coached in other ways. The witness may receive text messages on a cell phone, or emails during the testimony. Thus, the witness should be instructed to turn off his cell phone while testifying. If he does not, he should be instructed that he is to take screen shots of any messages. Or the witness may be told that if he receives any text messages or emails, he will be asked to identify the person involved in the communication and made to disclose the substance.

An attorney involved in the proceeding may be giving hand or facial signals via zoom. If this is noted, the attorney should be warned to cease this.

During a trial, a witness may be admonished by the judge not to discuss the subject of his testimony with anyone (a form of sequestration). This admonition should be given to the remote witness during breaks in his testimony. When testimony resumes after a break, the witness may be asked if he did speak with a person as to the subject of his testimony, and if so, asked to give the particulars of the conversation.

Your other thoughts and suggestions are appreciated.

**From:** [Babybahpybear Babybahpybear](#)  
**Sent:** Thursday, December 10, 2020 8:47 AM  
**To:** [rulecomments](#)  
**Subject:** CDAC Rule - Virtual Evidentiary

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I wanted to express my opinion on this proposed rule. I am in favor of it insofar as the parties consent to it versus the judge simply ordering it. I also feel that all witnesses must be subject to both direct and cross examination, not just merely filing an affidavit for their direct and then be subject to cross examination via video. This does not provide for an adequate forum for the witness to be heard.

I hope my comments are helpful.

Jeremy Kim

Sent from [Mail](#) for Windows 10

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**From:** [ASSN. SUPREME COURT REPORTERS](#)  
**Sent:** Tuesday, November 17, 2020 4:22 PM  
**To:** [rulecomments](#)  
**Subject:** REQUEST FOR PUBLIC COMMENT re NEW COMMERCIAL DIVISION RULE

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I have read the Memorandum dated October 22, 2020 regarding The Administrative Board of The Courts seeking public comment on a proffered proposal by the Commercial Division Advisory Council to permit virtual evidentiary hearings and non-jury trials, at the discretion of the judges and upon consent of parties.

I would just like to clarify the last sentence of the second paragraph on the first page of the memorandum. That sentence reads: "The video technology also must allow for a verbatim record of the trial and public access to remote proceedings (Ex. A, p. 5)."

While I could not be more in agreement that the technology must allow for a verbatim record of the trial, as a Sr. Court Reporter and President of The Association of Supreme Court Reporters, it is preferable for the language to include language akin to "by the use of an official court reporter employed by The Unified Court System." Stenographic reporters have, for decades, proven to be the gold standard of producing verbatim court transcripts. Through no other means can a reliable and accurate transcript be produced.

While I do not believe that the language seeks to avoid the use of an official court reporter employed by the New York State Unified Court System, the vague language of "verbatim record of the trial..." can evolve into a misinterpretation at a later time.

I am available at your convenience to discuss this. I thank you for your indulgence.

Best,

Eric Allen

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**Eric Allen, President**  
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